STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 274390 Oakland Circuit Court
NEIL PATRICK BENNETT, Defendant-Appellant.	LC No. 2006-206697-FH

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 13-1/2 to 22-1/2 years for each conviction. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant was convicted of engaging in separate acts of digital and penile penetration with his former girlfriend's daughter between June 1996 and June 2001. At trial, the prosecutor presented evidence that defendant's sexual conduct continued after he moved out of the home that defendant shared with the victim and his former girlfriend, including one instance of penile penetration that allegedly occurred when the victim was 13 years old and visiting with defendant at his mother's home. The victim testified that she told her mother about the sexual abuse during a conversation about another female minor. The other minor was permitted to testify at trial, pursuant to MCL 768.27a, about two occasions in which defendant fondled her. She testified that defendant fondled her breasts in 1999, while they were inside a camper located in the backyard of the victim's home. She further testified that in 2002, after defendant developed a boyfriend-girlfriend relationship with her mother and moved into her home, defendant groped her breasts and crotch area after she accompanied him to a friend's home.

On appeal, defendant argues that the admission of the other minor's testimony violated his constitutional right to due process and that MCL 768.27a, the statute under which the evidence was admitted, violates separation of powers principles and, as applied to this case, constituted an unconstitutional ex post facto law.

Before considering defendant's claims, we note that this Court considered the admissibility of the other acts evidence in a prior interlocutory appeal in which this Court, in lieu of granting leave to appeal, peremptorily reversed the trial court's order disallowing the evidence

under MRE 404(b). This Court held that the evidence was admissible under MCL 768.27a, without regard to MRE 403. *People v Bennett*, order of the Court of Appeals, entered August 15, 2006 (Docket No. 272110).

As explained in *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000),

> [u]nder the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300.

The primary purpose of this doctrine is to maintain consistency and avoid reconsidering matters decided in a single lawsuit. *City of Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The doctrine does not limit an appellate court's power, but rather is a discretionary rule of practice. *Id.* at 135-136. The doctrine only applies to questions actually decided, implicitly or expressly, in a prior appeal and questions necessary to the decision where facts remain materially the same. *Grievance Administrator*, *supra* at 260; *City of Kalamazoo*, *supra* at 135. But the doctrine need not be applied to create an injustice. *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981). Exceptions have been recognized where the prior appellate decision would preclude an independent review of constitutional facts or an intervening change of law occurred. *Freeman v DEC Int'l*, 212 Mich App 34, 38; 536 Mich 815 (1995). Therefore, in criminal cases, where a court retains authority to grant a new trial in the interest of justice, the law of the case doctrine does not automatically doom a defendant's arguments. *People v Herrera*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994).

In this case, the trial court initially excluded the other acts evidence, finding that it was not admissible under MRE 404(b). The trial court also denied the prosecutor's motion for reconsideration. This Court peremptorily reversed the trial court's decision, relying instead on MCL 768.27a.

We conclude that a proper application of the law of the case doctrine to the circumstances of this case precludes reconsideration of whether the other acts evidence involving defendant's fondling of the other minor is admissible under MCL 768.27a. However, this Court did not previously consider the constitutional challenges to MCL 768.27a that defendant presents in this appeal.

Because defendant did not previously challenge the constitutionality of MCL 768.27a in the trial court or in opposition to the prosecution's earlier application for leave to appeal, these issues are unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (an

objection to evidence on one ground does not preserve an appellate attack on a different ground). We review unpreserved issues for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Defendant's separation of powers argument has been rejected by this Court. In *People v Pattison,* 276 Mich App 613; 620; 741 NW2d 558 (2007), this Court held that MCL 768.27a does not infringe on our Supreme Court's rulemaking authority because it is a substantive rule of evidence that reflects a legislative intent to give juries an opportunity to "weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." See also *People v Watkins,* 277 Mich App 358; 745 NW2d 149 (2007); MCR 7.215(J)(1). Similarly, *Pattison* is also dispositive of defendant's claim that MCL 768.27a is an invalid ex post facto law. The Court in *Pattison, supra* at 618-619, held that the statute does not violate the Ex Post Facto Clause because the altered evidentiary standard does not lower the quantum of proof or value of evidence needed to convict a defendant.

We note, however, that this Court's earlier peremptory order is inconsistent with the decision in *Pattison* to the extent that this Court stated that the other acts evidence in this case was admissible under MCL 768.27a and that the statute "precludes exclusion of the evidence under an MRE 403 analysis." In *Pattison, supra* at 621, this Court cautioned trial courts "to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403." Although an intervening change in the law is a recognized exception to the law of the case doctrine, *Pattison* did not change any law, but rather interpreted the applicable law. Therefore, we decline to revisit this interpretative issue under the law of the case doctrine. *Freeman, supra* at 38.

We similarly decline to address whether the application of MCL 768.27a in this case violated defendant's right to due process. Not only is this issue unpreserved, it does not appear in defendant's statement of facts and he devotes a single, short paragraph to this issue with no analysis and little citation to relevant authority. A party cannot assert a position and then leave it to this Court to search for authority to sustain or reject that position. *People v Traylor,* 245 Mich App 460, 464; 628 NW2d 120 (2001), or to unravel and elaborate for him his arguments. *Mudge v Macomb Co,* 458 Mich 87, 105; 580 NW2d 845 (1998).

Next, we consider defendant's claim that he was denied the effective assistance of counsel because trial counsel did not file a response to the prosecutor's prior interlocutory application for leave to appeal the trial court's ruling excluding the other acts evidence. We note that this Court previously denied defendant's motion to remand for a *Ginther*[1] hearing on this issue for failure to persuade the Court of the necessity of a remand at that time. We similarly find no basis for a remand. MCR 7.211(C)(1)(a).

Limiting our review to mistakes apparent from the record, defendant has not met his burden of establishing the requisite deficient performance and prejudice necessary to succeed on a claim of ineffective assistance of counsel. *People v Frazier,* 478 Mich 231, 243; 733 NW2d

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

713 (2007); *People v Thomas*, 260 Mich App 450, 456-457; 678 NW2d 631 (2004). We decline to presume prejudice because this case does not involve the complete denial of counsel at a critical stage. *Frazier, supra* at 243. Unlike the situation in *United States ex rel Thomas v O'Leary*, 856 F2d 1011 (CA 7, 1988), in which there was no response to a state's appeal from an evidentiary ruling, trial counsel in this case submitted a copy of his trial court response to the prosecutor's evidentiary motion in lieu of filing an answer to the prosecutor's application for leave to appeal. Therefore, we must presume that counsel was effective, and defendant has the burden of showing both deficient performance and resulting prejudice. *Frazier, supra* at 243; *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Even if trial counsel should have presented a specific argument concerning MCL 768.27a in response to the prosecutor's application for leave to appeal, because defendant has failed to establish any reasonable probability that application of this statute would have resulted in the exclusion of the other acts evidence, defendant's claim of ineffective assistance of counsel cannot succeed. *Frazier, supra* at 243.

Finally, defendant argues that he is entitled to resentencing because the trial court erroneously scored 15 points for offense variable (OV) 10, MCL 777.40. In general, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). But we review questions of law involving the interpretation of the sentencing guidelines de novo. *Id.*

The instructions for OV 10 (exploitation of victim's vulnerability) state that 15 points should be scored if predatory conduct was involved. MCL 777.40(1)(a). The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The timing and location of a sexual assault may constitute evidence that a defendant engaged in preoffense predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

The record discloses that the trial court relied solely on an uncharged act, which occurred after defendant moved out of the victim's home, to determine that 15 points should be scored for OV 10. Although there are circumstances where uncharged conduct may be considered in scoring the offense variables, the legislative intent expressed in the statutory language is determinative of this issue. See *People Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Where statutory language is unambiguous, we give the words their plain meaning and apply the statute as written. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). Because the scoring of OV 10 must be based on *preoffense* conduct, not other uncharged offenses not involving the conviction offenses, we conclude that the trial court committed an error of law by scoring 15 points for OV 10 on the basis of a separate, uncharged offense.

We reject the prosecutor's argument that the trial court's scoring decision may be affirmed because it reached the right result for the wrong reason similar to *Witherspoon, supra*, and *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004). Unlike this case, both of those cases involved conduct related to the conviction offense. Although the prosecutor argues that the circumstances surrounding the digital penetration offense of which defendant was convicted support a 15-point score for OV 10, defendant is entitled to be sentenced in conformity with the law, and the trial court's error affects the appropriate guidelines range. Accordingly, we remand

for resentencing, without prejudice to the trial court considering whether preoffense conduct supports a score of 15 points for OV 10. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

Affirmed in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey